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No. 03-239

IN THE

Supreme Court of the United States

CHANDRA SPENCER; FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE, A Professional Corporation,
Petitioners,

vs.

RAUL GONZALES, JR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONERS

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In The
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CHANDRA SPENCER; FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE, A Professional Corporation; COUNTY OF LOS ANGELES,
Petitioners,

vs.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

THE AMICI CURIAE

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

MOTION OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES TO FILE AMICUS CURIAE BRIEF

Pursuant to this Court's Rule 37.3(b), the California State Association of Counties ("CSAC") respectfully moves this Court for leave to file the attached Brief of Amicus Curiae in support of the Petitioners. A letter of consent from the Petitioners to the filing of this brief has been filed with the Clerk. However, Respondent's counsel has declined to give consent.

CSAC's specific interest in this case lies in its impact on California's 58 counties. The counties are a repository of vast amounts of confidential information. Not only juvenile court records like those at issue in the present case, but also medical records, mental health records, tax records, welfare agency records, law enforcement records, jail records and so on. All are protected from disclosure to one degree or another by statutes and regulations. And all become relevant at one time or another in litigation against counties. Questions invariably arise about the extent to which the counties may access these records, which they possess and control, in response to litigation and for administrative purposes.

The Ninth Circuit Court of Appeals decision holds that the Petitioner County of Los Angeles violated the Fourth Amendment prohibition against unreasonable searches and seizures and the Fourteenth Amendment right of privacy when it failed to follow proper procedures in accessing relevant juvenile court records in response to the juvenile Respondent's lawsuit against County and its juvenile court for damages. The implications are dramatic, since presumably

counties would also be liable for violating the Fourth and Fourteenth Amendments whenever they violate state statutes and rules that control the disclosure of the confidential records in their possessions. Such violations should not be condoned. However, for the reasons outlined in the accompanying brief, they do not rise to the level of a violation of the Fourth or Fourteenth Amendment.

September 12, 2003

Respectfully submitted,

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QUESTIONS PRESENTED

1. Does government violate a juvenile's Fourth Amendment rights when it accesses confidential juvenile court records about him without first obtaining a court order as required by state law?

2. Does government violate a juvenile's Fourth Amendment rights if the juvenile court records are discoverable in the juvenile's civil action against the government?

3. Under the above circumstances, does government violate a Fourteenth Amendment right to privacy by accessing juvenile court records without first obtaining a court order?

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INTEREST OF THE AMICUS CURIAE[1]

The Ninth Circuit's Memorandum Decision holds that a county violates a juvenile's Fourth and Fourteenth Amendment rights when it accesses confidential information about him without first obtaining a court order as required by state law. This decision federalizes a violation of state law. It has negative ramifications for counties, because they manage many categories of confidential information that include not only juvenile court records but also medical, mental health, welfare, tax and law enforcement records. Under the Ninth Circuit's decision, a misstep in accessing or disclosing any of these may transgress the Fourth and Fourteenth Amendments.

As discussed in this Amicus Brief, the Ninth Circuit's views are at variance with other Circuit Courts of Appeals and District Courts that have held that accessing or disclosing such records does not violate a juvenile's constitutional rights. The instant petition provides a vehicle for resolving this disparity.

INTRODUCTION

The Ninth Circuit Court of Appeals' Memorandum Decision holds that Petitioner Chandra Spencer, acting under color of state law on behalf of Petitioner County of Los Angeles, violated Respondent Raul Gonzalez' constitutional rights when she inspected the juvenile court's record containing information about him without first obtaining a court order as required by state law. The Ninth Circuit was not explicit about whether it viewed Petitioners' actions as the violation of a Fourth Amendment right to be free from unreasonable searches, a violation of a Fourteenth Amendment

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[1] This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

right to privacy, or both. However, as this brief demonstrates, the Ninth Circuit erred in ruling for the Respondent because the Petitioners transgressed neither the Fourth nor Fourteenth Amendment.

ARGUMENT

No Fourth Amendment Violation

The Ninth Circuit decision repeatedly refers to "Gonzalez's file" or "his file."[2] Of course, that is just a manner of speaking because the file is not "his," but the juvenile court's. It is "his file" only in the sense that it contains information about him. Thus, Petitioner Spencer's review of the juvenile court's file did not constitute a violation of the Fourth Amendment in the literal sense of a search of Respondent's person or private papers. As stated in *United States v. Miller,* with reference to Government's subpoena of bank records, "[on] their face, the documents subpoenaed here are not [the account holder's] 'private papers'" because the account holder can "assert neither ownership nor possession."[3] Precisely the same can be said of Respondent's juvenile court records.

As further stated in *United States v. Miller,*

> "This Court has repeatedly held that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government

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[2] *Gonzalez v. Spencer*, 336 F.3d 832, 835, 836 (9th Cir. 2003).

[3] *United States v. Miller,* 425 U.S. 434, 440 (1976).

> authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."[4]

Therefore, the Ninth Circuit erred when it implied, without discussion, that the Petitioners presumptively violated the Fourth Amendment when they accessed the *juvenile court's* file on Respondent.[5]

Of course, in *Katz v. United States*, this Court "departed from the narrow view" that "'property interests control the right of Government to search and seize,'"and that a "search and seizure become unreasonable when the Government's activities violate "the privacy upon which [a person] justifiably relie[s]."[6] In his concurring opinion, Justice Harlan distilled a two part test from earlier Fourth Amendment cases: "[F]irst that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[7] This has become the accepted standard.[8]

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[4] *United States v. Miller, supra*, 425 U.S. at 443, *citing United States v. White*, 401 U.S. 745, 751-752 (1971), *Hoffa v. United States*, 385 U.S. 293, 302 (1966), and *Lopez v. United States*, 373 U.S. 427 (1963).

[5] *Gonzalez v. Spencer, supra,* 336 F.3d at 835 (2003).

[6] *Katz. v United States*, 389 U.S. 347, 353 (1967).

[7] *Id.*, 389 U.S. at 361. (Harlan, J., concurring)

[8] *Kyllo v. United States,* 533 U.S. 27, 33 (2001).

Therefore the question is: Under the circumstances of this case, did California's protections against disclosure of juvenile court records create a reasonable expectation that they would not be disclosed to the Petitioners? The answer is "no," because in an underlying federal civil rights action, the Respondent had sued Petitioner County and its juvenile court for damages. The juvenile court possessed records about Respondent that were relevant to his claim against the County. On the basis of that relevance, the District Court in the underlying action held, after the Petitioners had already accessed the records and Respondent had moved to suppress them, that Petitioners were entitled to them pursuant to their discovery rights.[9]

The District Court's ruling in the underlying case followed the well-established principle, requiring little explanation, that a plaintiff's suit for damages may waive privileges or rights to privacy if the information is material to the defense. Thus, in a suit for personal injuries, a plaintiff must disclose otherwise privileged physician's records.[10] Similarly, in a suit for lost income plaintiff may be required to produce otherwise privileged state tax records;[11] and in cases of alleged governmental wrongdoing, the executive privilege may be circumscribed.[12] Conversely, a plaintiff may be able

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[9] App. B3-4, C3.

[10] *Palay v. Superior Court,* 18 Cal.App.4th 919, 22 Cal.Rptr.2d 839 (1993); *Slagle v. Superior Court,* 211 Cal.App.3d 1309, 260 Cal.Rptr. 122 (1989).

[11] *Wilson v. Superior Court,* 63 Cal.App.3d 825, 134 Cal.Rptr. 130 (1976).

[12] *United States v. Nixon,* 418 U.S. 683, 713 (1974).

to obtain the defendant's otherwise confidential bank records;[13] private personnel records;[14] and in the case of excessive force civil rights litigation, citizen complaints against the involved officer.[15]

The same logic applies to the discovery of information about Respondent in the juvenile court's file. California Welfare & Institutions Code section 827 generally limits access to court, school, law enforcement, child protection agency and other designated personnel.[16] However, the restriction of access is not absolute. Section 827(a)(1)(M) provides that a file may be inspected by "any other person who may be designated by court order of the judge of the juvenile court upon filing a petition." Thus, juvenile records are confidential,[17] but their confidentiality is not "absolute."[18]

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[13] *Hooser v. Superior Court*, 84 Cal.App.4th 997, 1004, 101 Cal.Rptr.2d 341, 346 (2000); *Moskowitz v. Superior Court*, 137 Cal.App.3d 313, 318, 187 Cal.Rptr. 4, 8 (1983).

[14] *Muskovitz v. Lubbers*, 182 Mich.App. 489, 498, 452 N.W. 2d 854, 858 (1990); *Board of Trustees v. Superior Court*, 119 Cal.App.3d 516, 533, 174 Cal.Rptr.160, 169 (1981).

[15] California Evidence Code section 1043; *Rosales v. City of Los Angeles*, 82 Cal.App. 4th 419, 426-427, 98 Cal.Rptr.2d 144, 149 (2000).

[16] California Welfare & Institutions Code section (a)(1).

[17] *T.N.G. v. Superior Court*, 4 Cal.3d 767, 778, 484 P.2d 981, 987, 94 Cal.Rptr. 813, 819 (1971).

[18] *In re Michael B.*, 8 Cal.App. 4th 1698, 1707, 11 Cal.Rptr.2d 290, 296 (1992).

When a third party petitions for disclosure of records under California Welfare & Institutions Code section 827(a)(1)(M), the juvenile court considers the interests of, not only the child, but also the petitioner and the public.[19] For example, in *In re Keisha T.*, the Court held that a request by the press for information relevant to "public awareness" may warrant disclosure of juvenile records.[20] In *Foster v. Superior Court,* the court held that, upon a showing of "plausible justification for inspection," a criminal defendant could obtain the prosecuting witnesses's juvenile records.[21] The court reasoned that a criminal defendant's constitutional right to confrontation and cross-examination trumps state law privacy considerations.[22]

The California District Court of Appeal decision in *Navajo Express v. Superior Court* is of particular interest.[23] The Court ruled that California Welfare & Institutions Code section 827 does not prevent discovery of a civil plaintiff's juvenile court records.[24] In that case, the adult plaintiff

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[19] *People v. Superior Court,* 107 Cal.App.4th 488, 492, 132 Cal.Rptr.2d 144, 147 (2003).

[20] *In re Keisha T.*, 38 Cal.App.4th 220, 240, 44 Cal.Rptr.2d 822, 833 (1995).

[21] *Foster v. Superior Court,*107 Cal.App.3d 218, 229-230, 165 Cal.Rptr. 701, 708-709 (1980).

[22] *Id.*, 107 Cal.App.3d at 229, 165 Cal.Rptr. at 708.

[23] *Navajo Express v. Superior Court*, 186 Cal.App.3d 981, 231 Cal.Rptr. 165 (1976).

[24] *Id.*, 186 Cal.App.3d at 985, 231 Cal.Rptr. at 168-169.

suffered brain damage when defendant's truck struck him. Plaintiff claimed that the injury caused him to engage in violent behavior and that he had no prior history of emotional problems. After the juvenile court denied defendant's motion to disclose plaintiff's juvenile records, the appellate court reversed, holding that relevancy to an issue raised by plaintiff constitutes good cause for discovery, and that the defendant's need for information outweighed the plaintiff's confidentiality interest. The court explicitly rejected plaintiff's contention that the state legislature's enactment of section 827 "reveals an intention that juvenile records not be subject to discovery in a civil action brought by the minor."[25] The court held that "the section itself contemplates that situations will exist where inspection by third parties will be permitted and puts the protection of confidentiality of the records within the discretion of the juvenile court."[26]

On the record before it, this Court need not revisit the question of whether the juvenile court records *were* discoverable in the underlying action. The District Court, in denying Respondent's motion to suppress the evidence contained in the juvenile court file, held that the records were discoverable.[27] The subject Ninth Circuit decision does not overrule – or even question – the District Court's decision on that point.[28]

From the Fourth Amendment perspective, it does not

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[25] *Id.*, 186 Cal.App.3d 985, 231 Cal.Rptr. at 167.

[26] *Id.* 186 Cal.App.3d at 985-986, 231 Cal.Rptr. at 167-168.

[27] App. B3-4, C3.

[28] *See Gonzalez v. Spencer, supra,* 336 F.3d at 835.

matter whether Petitioners followed the correct procedure for accessing Respondent's records under California Welfare & Institutions Code section 827(a)(1)(M). Petitioner's actions may have violated state law. (A debatable conclusion as Justice Fletcher's dissenting opinion demonstrates.[29]) But absent a reasonable expectation of privacy for the juvenile court's record in the context of Respondent's federal civil rights action against the County and its juvenile court, the Petitioners' access to the records did not violate his *Fourth Amendment* rights.

The Ninth Circuit mistakenly compared the situation in the present case to an illegal search that cannot be rectified by a later showing that a magistrate would have issued a search warrant if asked, or that government inevitably would have found the seized items anyway. On that basis, the Ninth Circuit reasoned that Respondent could obtain at least nominal damages, even though in the underlying action the court held, after the fact, that the juvenile court's records were discoverable.[30] However, the Ninth Circuit's reasoning is fallacious, because it erroneously assumes that the Fourth Amendment prohibits disclosure of juvenile court records. For the reasons already stated, it clearly does not.

The Ninth Circuit was troubled by the Petitioners' presumed violation of the requirement of California Welfare & Institutions Code section 827(a)(1)(M) and California Rules of Court rule 1423(b) for a court order granting access to juvenile court records. However, the statute and the rule create *procedural*, not *substantive* rights. Federal courts have

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[29] *Gonzalez v. Spencer, supra,* 336 F.3d at 836-839 (Fletcher, J., dissenting).

[30] *Gonzalez v. Spencer, supra,* 336 F.3d at 835.

explored and rejected the notion that *procedural* requirements for notice and hearing in advance of disclosure of information about juvenile offenders confer a *substantive* property or liberty interest. For instance, in *United States v. Jiles*, the Third Circuit Court of Appeals held that the government's use of a juvenile offender's photograph to enable a witness to identify him as the perpetrator of a crime, without first obtaining a court order for its production as required by state statute, did not violate the Fourteenth Amendment, because the statute did not confer a substantive right on the juvenile.[31] As the Court stated:

> "In the instant case, the state created a procedure to protect juveniles from having their juvenile records released to the public. [Citation omitted.] Within that procedure was a special safeguard requiring that a court order be secured before photographs from juvenile records are released to other law enforcement officials. This safeguard, while helpful to the state in ensuring that such records are not released to the general public, did not create a property interest on behalf of the appellee."[32]

Similarly, in *McCrary v. Jetter*, the Court held that a state statute prohibiting the removal of a youthful offender's photograph from his juvenile court file without the required court order did not create a substantive right.[33] On the basis

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[31] *United States v. Jiles*, 658 F.2d 194 (3rd Cir. 1981)

[32] *Id.*, 658 F.2d at 200.

[33] *McCrary v. Jetter*, 665 F.Supp. 182 (E.D.N.Y. 1987).

of *Hewitt v. Helms*[34] and *Olim v. Wakinekonal*,[35] the Court held that the statute's procedural requirement for a court order did not confer a property or liberty interest on the juvenile. The critical distinction, in that Court's view, was whether the statute's non-disclosure provisions were mandatory (creating a substantive right) or discretionary (creating only a procedural right). The Court determined that the statute in question "does not, in any way, circumscribe the court's discretion in authorizing a release of the files."[36] Therefore, the government's failure to obtain a court order for disclosure of the juvenile's photograph did not create a property or liberty interest.

In this regard, the provisions of Welfare & Institutions Code section 827(a)(1)(M) and California Rules of Court rule 1423(b) deserve consideration. The former imposes *no* criteria for the court to consider in ruling on a petition for disclosure of juvenile court records. The latter states only that: "[in] determining whether to authorize inspection or release of juvenile court records, in whole or in part, the court shall balance the interests of the child and other parties to the juvenile court proceeding, the interests of the petitioner, and the interests of the public." This scheme obviously invests broad discretion in the court. It is procedural, and does not confer substantive rights on the juvenile.

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[34] *Hewitt v. Helms*, 459 U.S. 460, 471-472 (1983).

[35] *Olim v. Wakinekonal*, 461 U.S. 238, 249-250 (1983).

[36] *McCrary v. Jetter, supra*, 658 F.2d at 185.

It must be added that in *Sandin v. Conner*, a prisoners' rights case, this Court overruled *Hewitt*[37] and *Olim* [38] on the ground that they unnecessarily distinguished between mandatory and discretionary rules.[39] *Sandin* held that *neither* confers substantive rights in the context of prison regulations. That decision only strengthens the conclusion that Petitioner's alleged transgression of Welfare & Institutions Code section 827(a)(1)(M) and California Rules of Court rule 1423(b) did not violate Respondent's rights under the Fourth or Fourteenth Amendment. Respondent may have a state law remedy, but he does not have a federal remedy for the alleged violation of his civil rights.

The Fourteenth Amendment due process cases, cited above, bring the Amici's argument full circle. Respondent has no ownership of the juvenile court's records; nor did California Welfare Institutions Code section 827(a)(1)(M) and California Rules of Court rule 1423(b) confer a property interest upon him. One may not presume, therefore, that the Petitioners seized "his papers." Instead, Respondent is confined to arguing that he had a reasonable expectation of privacy in those records. For the reasons previously discussed, that argument must fail.

No Fourteenth Amendment Violation

In *Whalen v. Roe* this Court explained that one facet of the Fourteenth Amendment right to privacy protects "the individual interest in avoiding disclosure of personal

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[37] *Hewitt v. Helms, supra*, 459 U.S. 460.

[38] *Olim v. Wakinekonal, supra*, 461 U.S. 238.

[39] *Sandin v. Conner*, 515 U.S. 472 (1995).

matters."[40] The Ninth Circuit held that Petitioner violated Respondent's Fourteenth Amendment privacy interest by inspecting juvenile records pertaining to him without court authorization.[41] But this finding conflicts with this Court's repeated admonition that state procedure does not define the parameters of constitutional interests.[42]

For that reason, the Eighth and Tenth Circuit Courts of Appeals have held that illegal disclosure of criminal records does not implicate the Fourteenth Amendment right to privacy.[43] And the Sixth Circuit has treated state law violations as irrelevant to the right to privacy inquiry.[44]

These decisions clarify that *Whalen*'s "individual interest" arises, not from state procedure, but from "more specific . . . guarantees" in the Constitution itself.[45] Thus, a Fourteenth Amendment right of privacy only encompasses matters that are "fundamental" or "implicit in the concept of ordered liberty." [46]

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[40] *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

[41] *Gonzalez v. Spencer, supra*, 336 F.3d at 835.

[42] *Hewitt v. Helms, supra*, 459 U.S. 460; *Sandin v. Conner, supra*, 515 U.S. 472.

[43] *Eagle v. Morgan*, 88 F.3d 620 (8th Cir. 1996); *Nilson v. Layton City*, 45 F.3d 369 (10th Cir. 1995).

[44] *J.P. v. DeSanti*, 653 F.2d 1080, 1087 (1981).

[45] *Paul v. Davis*, 424 U.S. 693, 713 (1976).

[46] *Palko v. Conneticut*, 302 U.S. 319, 325 (1937).

This Court has decided that an individual holds no such privacy interest in his criminal record.[47] Further, in *J.P v. DeSanti*, the Sixth Circuit Court of Appeals held that, even allowing for the sensitive nature of juvenile proceedings, minors have no constitutional interest that prevents disclosure of the juvenile court records to community groups.[48]

J.P. v. DeSanti, supra, closely parallels the present case. A class of plaintiffs alleged that a county juvenile court violated juveniles' constitutional right of privacy when it disseminated juvenile probation reports and records to 55 governmental, social, and religious agencies that were members of a "social services clearing house," in contravention of a state statute that made probation department reports and records confidential. In holding that a juvenile does not have a right to privacy for information in juvenile court records, the Sixth Circuit said:

> "[T]he fact that the Constitution protects several specific aspects of individual privacy does not mean that it protects all aspects of individual privacy. Nor is there indication in any of the above decisions of a constitutional right to nondisclosure of juvenile court records. Rather, such disclosure is indistinguishable from that permitted in Paul v. Davis,

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[47] *Paul v. Davis, supra,* 424 U.S. 693; *J.P. v. DeSanti, supra,* 653 F.2d 1080; *Cutshall v. Sundquist,* 193 F.3d 466 (6th Cir. 1999); *Cline v. Rogers*, 87 F.3d 176 (6th Cir. 1996); *Hodge v. Jones,* 31 F.3d 157 (4th Cir. 1994); *Nilson v. Layton City, supra*, 45 F.3d 369; *Eagle v. Morgan, supra*, 88 F.3d 620.

[48] *J.P. v. DeSanti, supra*, 653 F.2d 1080.

> 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). There the respondent alleged that circulation to merchants by police of the fact of his arrest for shoplifting (he had not been convicted) violated his constitutional right to privacy. The Court recognized that 'zones of privacy may be created by more specific constitutional guarantees . . . ' Id. at 712-713, 96 S.Ct. at 1165- 1166. However, the Court held, 'personal rights found in (the) guarantee of personal privacy must be limited to those which are 'fundamental' or 'implicit in the concept of ordered liberty' . . . Respondent's claim is far afield from (the privacy) line of decisions.' "[49]

Two federal courts have gone the other way, and found that non-disclosure statutes create a Fourteenth Amendment right to privacy in juvenile court records.[50] In *Soucie v. County of Monroe*, the District Court disagreed with *DeSanti* and held that "[t]he plaintiff's interest in non-disclosure is predicated on statutorily conferred expectations of privacy, and is thus well-founded and to a large extent defined by Fourth Amendment privacy motions."[51]

This court should grant the Petition for Certiorai to resolve the conflict between Circuit Courts of Appeals on the question of whether the Fourteenth Amendment creates a right

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[49] *Id.* at 713, 96 S.Ct. at 1166.

[50] *Doe v. Webster*, 606 F.2d 1226 (D.C. Cir. 1979); *Soucie v. County of Monroe,* 736 F.Supp.3d (W.D.N.Y. 1990).

[51] *Id.*, 736 F.Supp. 37.

of privacy in juvenile court files. However, this Court should also address whether, if such a right exists, the Petitioner violated it under the circumstances of the present case. After all, Petitioners accessed information relevant to Respondent's suit against them. As noted in the previous section, it is well established that one waives privacy rights by putting confidential information at issue. Thus, in this particular situation, Respondent's interest in privacy can hardly be described as "fundamental" or implicit in the concept ordered liberty. His claim to a constitutional right to privacy in his juvenile records–tenuous to begin with–stumbles fatally on this ground.

The California District Court of Appeal recently addressed this point in *Rosales v. City of Los Angeles.*[52] In an underlying suit, the City and a City police officer, Rosales, were sued based on the officer's alleged inappropriate sexual conduct with an under-age female police Explorer Scout. In response to the plaintiff's request for production of documents, the City Attorney provided Rosales' confidential personnel files to the plaintiff without complying with statutory procedures requiring consent or court order before releasing the files. Rosales then sued the City on a state law claim for "invasion of the right of privacy" and a Fourteenth Amendment claim for violation of the right of privacy. With respect to the state law claim, the court held:

> "Rosales has failed to state a claim for invasion of privacy because he could not have a reasonable expectation that his personnel records would not be disclosed in the litigation relating to the Explorer Scout. As we have

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[52] *Rosales v. City of Los Angeles*, 82 Cal.App.4th 419, 98 Cal.Rptr. 144 (2000)

> already made clear, the privilege of confidentiality is conditional and must be balanced with the right of a litigant to obtain information or records that are material to the subject matter of the litigation. In an action alleging sexual misconduct during his employment as an officer, as well as allegations of negligent hiring and negligent entrustment on the part of the City, it would be completely unreasonable for Rosales to expect that his personnel file would not be disclosed to plaintiff's counsel or used by the City in its defense to that action."[53]

And with respect to the Fourteenth Amendment privacy claim, the Court held:

> "The United States Supreme Court has held that the constitutional right to privacy protects individuals from government disclosure of personal information (*Whalen v. Roe* (1977) 429 U.S. 589, 599-600 [97 S.Ct. 869, 876-877, 51 L.Ed.2d 64].) In determining whether information is of such a highly personal nature that it demands constitutional protection, the party asserting the right must have a legitimate and reasonable expectation of privacy. (*Nilson v. Layton City* (10th Cir. 1995) 45 F.3d 369, 371.) As we have already concluded in connection with the invasion of privacy claim under state law, Rosales could

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[53] *Id.*, 82 Cal.App.4th at 428-429, 98 Cal.Rptr. 150.

> have no reasonable expectation of privacy that his personnel file would not be disclosed in the litigation relating to the Explorer Scout. This is especially so given the type of allegations made against the City and Rosales as its employee. Rosales has thus failed to state a cause of action for violation of his federal civil rights."[53]

In the present case, surely there could be no expectation of privacy where Respondent himself initiated the litigation that led to the review of his records.

CONCLUSION

Amicus Curiae CSAC respectfully requests the Court to grant the Petition for Writ of Certiorai.

September 12, 2003

Respectfully submitted,

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[53] *Id.*, 82 Cal.App.4th at 431, 98 Cal.Rptr.2d at 152